

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RALPH GAUSVIK,

Plaintiff,

vs.

ROBERT RICARDO PEREZ,
individually, and in his
official capacity; et al.,

Defendants.

No. CV-01-071-AAM

**ORDER GRANTING DEFENDANT'S
MOTION FOR RECONSIDERATION**

BEFORE THE COURT is defendant Badgley's Motion For Reconsideration (Ct. Rec. 314).

I. BACKGROUND

Defendant asks the court to reconsider its June 7, 2005 "Order Granting Motion For Reconsideration, In Part" (Ct. Rec. 313) which found plaintiff was entitled to an award of attorney's fees pursuant to RCW 4.84.250 for prevailing on defendant's malicious prosecution counterclaim. Based on *Mackey v. American Fashion Institute Corp.*, 60 Wn.App. 426, 804 P.2d 642 (1991), this court determined the total value of defendant's malicious prosecution counterclaim pursuant to RCW 4.24.350(2) did not include the attorney's fees and costs sought by defendant and included only the \$1,000 he sought as liquidated damages. Therefore, since the total value of Badgley's unsuccessful counterclaim did not exceed \$10,000, this court held that plaintiff, as the "prevailing party," was entitled to attorney's fees pursuant to RCW

1 4.84.250.

2
3 **II. DISCUSSION**

4 As defendant points out, the *Mackey* case was not cited by plaintiff until he cited it in his
5 reply brief in support of his motion for reconsideration. Therefore, defendant asserts that until
6 now, he did not have a chance to specifically address that case. *Mackey* did not involve RCW
7 4.24.350. It involved a different statute, RCW 49.52.070. This court recognized as much in its
8 order, but noted the similarity in the language of the two statutes in concluding attorney's fees
9 and costs were not an element of damages under RCW 4.24.350.

10 At common law, malicious prosecution required a plaintiff to prove: (1) the defendant
11 instituted or maintained the alleged malicious prosecution action; (2) lack of probable cause to
12 institute or continue the prosecution; (3) malice; (4) the proceedings ended on the merits in favor
13 of the plaintiff or were abandoned; and (5) the plaintiff suffered injury or damage as a result.
14 *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). The Washington
15 Legislature abrogated the fourth element by permitting a defendant to assert a malicious
16 prosecution counterclaim under RCW 4.24.350. *Brin v. Stutzman*, 89 Wn.App. 809, 818-19, 951
17 P.2d 291 (1998). Although actions for malicious prosecution began as a remedy for unjustifiable
18 criminal proceedings, Washington recognizes this remedy where civil actions have been initiated
19 without support. *Clark v. Baines*, 114 Wn.App. 19, 24, 55 P.3d 1180 (2002), *overruled on other*
20 *grounds*, 150 Wn. 2d 905, 84 P.3d 245 (2004); *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d
21 956, 965, 603 P.2d 828 (1979).

22 In his motion for reconsideration, defendant Badgley relies on *Rorvig v. Douglas*, 123
23 Wn.2d 854, 873 P.2d 492 (1994), a case that followed *Mackey*. *Rorvig* involved landowners
24 bringing a slander of title action against adjacent landowners. The Washington Supreme Court
25 held attorney's fees were recoverable as special damages in such an action. *Id.* at 497. The
26 court observed that although it was well established that absent a contract, statute, or recognized
27 ground of equity, a prevailing party does not recover attorney's fees as costs of litigation, there
28 were circumstances where attorney's fees should be recovered as damages. *Id.* According to the

1 court:

2 In **malicious prosecution** and wrongful attachment or garnishment,
 3 we have held that attorney fees are recoverable as special damages.
 4 **In malicious prosecution, it has long been the rule that damages**
 5 **include the attorney fees for the underlying action made necessary**
 6 **by the defendant's wrongful act. *Aldrich v. Inland Empire Tel. &***
 7 ***Tel. Co.*, 62 Wash. 173, 176-77, 113 P. 264 (1911).** Similarly,
 in wrongful attachment or garnishment actions, and in actions
 to dissolve a wrongful temporary injunction, attorney fees are a
 "necessary expense incurred" in relieving the plaintiff of the wrongful
 attachment or temporary injunction, and are recoverable. [Citations
 omitted].

8 Slander of title is analogous to these actions. It is the defendant who
 9 by intentional and calculated action leaves the plaintiff with only
 one course of action: that is, litigation. **In malicious prosecution,**
 10 **wrongful attachment, and slander of title, the defendants actually**
 11 **know their conduct forces the plaintiff to litigate. In addition, similar**
 12 **to malicious prosecution and wrongful attachment, actual damages**
 are difficult to establish and often times are minimal in slander of
 title. Fairness requires the plaintiff to have some recourse against
 the intentional malicious acts of the defendant.

13 *Id.* (Emphasis added).

14 *Aldrich* is obviously still good law, as evidenced by the state supreme court's reliance on
 15 it in the *Rorvig* opinion. Although the plaintiff notes that *Aldrich* involved a malicious
 16 prosecution claim brought following successful defense of a criminal complaint, he does not
 17 explain why that is significant. As noted above, Washington has now recognized for many years
 18 that a malicious prosecution claim is a remedy for a civil action which has been initiated without
 19 support. Furthermore, although *Rorvig* obviously did not involve RCW 4.24.350 (and *Aldrich*
 20 was decided 73 years before enactment of RCW 4.24.350 in 1984), all that this statute did was
 21 abrogate one element of the common law malicious prosecution claim. The court fails to see
 22 how abrogation of this one element would take a malicious prosecution claim out of the
 23 exception recognizing attorney's fees as an element of special damages. The provision for
 24 \$1,000 liquidated damages in RCW 4.24.350(2) is consistent with the rationale for including
 25 malicious prosecution claims within the exception as explained in *Rorvig*. Because actual
 26 damages are difficult to establish, liquidated damages are made available. Attorney's fees and
 27 costs, on the other hand, are easily ascertainable and therefore, are not included within the
 28 \$1,000 liquidated damages.

ORDER GRANTING DEFENDANT'S
MOTION FOR RECONSIDERATION- 3

1 The “Legislative Findings” with regard to RCW 4.24.350 are also consistent with the
2 statement in *Rorvig* that “[f]airness requires the plaintiff to have some recourse against the
3 intentional malicious acts of the defendant.” According to those findings:

4 The legislature finds that a growing number of unfounded
5 lawsuits, claims, and liens are filed against law enforcement
6 officers, prosecuting authorities, and judges, and against their
7 property, having the purpose and effect of deterring those officers
8 in the exercise of their discretion and inhibiting the performance
9 of their public duties.

10 The legislature also finds that the cost of defending against such
11 unfounded suits, claims and liens is severely burdensome to such
12 officers, and also to the state and the various cities and counties of the
13 state. **The purpose of section 2 of this 1984 act is to provide a remedy
14 to those public officers and to the public.**

15 (Emphasis added).

16 Moreover, if the only element of special damages under RCW 4.24.350(2) was the
17 \$1,000 in liquidated damages (without consideration of fees and costs incurred in defending
18 against the action that gave rise to the malicious prosecution counterclaim), judges, prosecuting
19 authorities and law enforcement officers would always, and without exception, be liable for
20 mandatory attorney’s fees under RCW 4.84.250 when they do not prevail on their malicious
21 prosecution counterclaims. It is hard to fathom the legislature intending such a result. On the
22 other hand, if attorney’s fees and costs are an element of damages under RCW 4.24.350(2), an
23 unsuccessful counterclaimant employing that statute could still be subject to RCW 4.84.250,
24 provided the combined total of liquidated damages and attorney’s fees and costs sought by him
25 did not exceed \$10,000.

26 *Rorvig* persuades the court that the rule is that attorney’s fees and costs should be treated
27 as an element of damages (special damages) in a malicious prosecution claim or counterclaim. It
28 is not apparent why RCW 4.24.350 should alter this rule. All that RCW 4.24.350 did was
abrogate one element of the common law malicious prosecution claim. RCW 4.24.350 existed at
the time *Rorvig* was decided and the state supreme court apparently did not think that changed
anything about the rule first enunciated in *Aldrich* that attorney’s fees and costs are an element of
damages in a malicious prosecution claim. It is reasonable to believe that if the statute altered

1 the rule, the court would have said something about it in *Rorvig*.

2 This court considered certifying to the state supreme court the specific question of
3 whether under RCW 4.24.350(2), attorney's fees and costs are considered an element of
4 damages in determining whether an unsuccessful claimant is liable for attorney's fees under
5 RCW 4.84.250. This court finds, however, that *Rorvig* is clear enough guidance for answering
6 that question. Of course, the plaintiff is entitled to appeal and may persuade the Ninth Circuit
7 that certification is appropriate. After two rounds of reconsideration proceedings, this court
8 would hope the matter has been fully aired at this level and that an appeal would be the next step,
9 if any.

10 **III. CONCLUSION**

11 It is unfortunate *Rorvig* was not brought to the court's attention earlier so as to avoid this
12 second round of reconsideration proceedings. Nevertheless, it has now been brought to the
13 court's attention and persuades the court that it erred in granting plaintiff's request for fees
14 pursuant to RCW 4.84.250. In addition to \$1,000 in liquidated damages, defendant Badgley
15 sought attorney's fees and costs under RCW 4.24.350(2) in excess of \$9,000. (See declaration
16 of defendant's counsel at Ct. Rec. 309). Therefore, because his total claim for damages
17 exceeded \$10,000, defendant Badgley is not liable for attorney's fees under RCW 4.84.250.
18 Defendant's Motion For Reconsideration (Ct. Rec. 314) is **GRANTED** and plaintiff's request
19 for attorney's fees pursuant to RCW 4.84.250 is **DENIED**.

20 **IT IS SO ORDERED.** The District Executive shall enter this order and forward copies
21 of the same to counsel.

22 **DATED** this 7th of July, 2005.

23 s/ Alan A. McDonald
24 ALAN A. McDONALD
25 Senior United States District Judge
26
27
28